INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Constitutional and Statutory Provisions Involved	4
Statement of Facts	4
Reasons for Denying the Writ	9
Conclusion	15

Table of Authorities Cited

Cases	Pages
Airline Dispatchers Association v. National Mediation Board, 89 US App DC 24, 189 F (2) 685, cert. denied 342 US 841	10, 11
Decker v. Venezolana, 103 US App DC 301, 258 F (2) 153 (1958)	10
Leedom v. Kyne, 358 US 184	14
Switchmen's Union v. National Mediation Board, 320 US 297 (1943)	10, 11
Tunstall v. Brotherhood of Locomotive Firemen, 323 US 210 (1944)	10
U N A Chapter v. National Mediation Board, 294 F (2) 905, cert. denied 368 US 956	10
Virginian Ry. v. System Federation, 300 US 515 (1937)	10
WES Chapter v. National Mediation Board, 114 App DC 229, 314 F (2) 234 (1962)	10

Statutes	
Administrative Procedure Act, 5 USCA, Section 1001-11	11
Railway Labor Act, as amended, 44 Stat. 577, 45 USC 151a-152, Sections 2nd, 4th and 9th	4
Railway Labor Act, 45 USC, Section 151, et seq.	8
28 USC, Section 1254.1	2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

Nos. 369 and 138

NATIONAL MEDIATION BOARD, et al., *Petitioners,* vs. ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, *Respondent.*	No. 369
BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, *Petitioner,* vs. ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, *Respondent.*	No. 138

COMBINED BRIEF FOR RESPONDENT IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

The respondent, Association for the Benefit of Non-Contract Employees, submits herewith its combined

brief in opposition to the Petition of the National Mediation Board for Writ of Certiorari, No. 369, and Petition of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, No. 138, for Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered March 12, 1964. The actions were numbered 18068 and 18072 in the court below.

OPINIONS BELOW

The opinions of the District Court are reported at 218 F Supp 114 and are set forth in Appendix A, pages 23 to 58 of the Petition for Writ of Certiorari of the National Mediation Board on file herein. The opinion of the Court of Appeals is reported at 330 F 2d 853 and is set forth in Appendix A, pages 13 to 22, of the Petition for Writ of Certiorari of the National Mediation Board on file herein.

JURISDICTION

The judgment of the Court of Appeals was entered on March 12, 1964. The Petition for Writ of Certiorari was filed by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees in Case No. 138, June 1, 1964, and in Case No. 369 by the National Mediation Board August 10, 1964. Jurisdiction of this Court is sought to be invoked under 28 USC, Section 1254.1.

QUESTIONS PRESENTED

1. The National Mediation Board proposed to use in a representation election a ballot form which did not provide on it a space in which an eligible employee could indicate his desire to cast a valid vote not to be represented by a union. The questions presented are:

(a) Does this form of ballot violate the provisions of the Railway Labor Act by infringing upon rights given to the respondent's members by Congress?

(b) Does this form of ballot violate the provisions of the Railway Labor Act that the majority of the employees in a craft or class has the right to select the representative for the craft or class?

(c) Did the National Mediation Board violate the respondent's right to due process under the Fifth Amendment to the Constitution by depriving members of the right to freely determine representation? and,

(d) Are the actions of the National Mediation Board subject to review by the Federal Judiciary for the acts referred to in questions (a), (b), (c) above in the light of the provisions of the Railway Labor Act and the provisions of the Administrative Procedure Act?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved in the Due Process clause of the Fifth Amendment to the United States Constitution. The statutes involved are Sections 2nd, 4th, and 9th of the Railway Labor Act, as amended, 44 Stat 577, 45 USC 151a-152. These sections are set forth in Appendix B, pages 59 to 61 of the Petition of the National Mediation Board.

STATEMENT OF FACTS

The Association for the Benefit of Non-Contract Employees, the plaintiff in the District Court, the appellee in the Court of Appeals, and the respondent here, is a group of some 6,400 employees of United Air Lines, organized and incorporated under the name Association for the Benefit of Non-Contract Employees. The purpose for which the organization was formed was to seek a hearing before the National Mediation Board on a craft or class delineation, and to request a change in a proposed ballot. The craft or class contains over 12,700 ground employees of United Air Lines, of numerous occupations from ticket agents, public contact personnel, baggage handlers and aircraft cleaners (R 62, 130).[1] The request for a hearing sought National Mediation Board review of an older decision made in 1947 and that the National Mediation Board provide a form of ballot upon which eligible employees could cast a valid ballot for no representation by a union.

---

[1]References are to the printed joint appendix in the Court of Appeals Record.

In August of 1962, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees filed an application with the Board for an investigation of an alleged representation dispute among certain employees of the class or craft. The Board docketed the matter as case R-3590 and checked a number of authorization cards furnished by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees from employees in the class or craft in support of its application (R 37); the Board determined that a dispute existed among two unions: The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and the International Association of Machinists. In December, 1962, the Board ordered an election to determine the bargaining agent of the craft or class and proposed for use in said election a form of ballot which provided on its face a space wherein an eligible employee could vote for the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, a space for the International Association of Machinists, and a space wherein the employee could write in the name of any organization or individual he wished to represent him (R 45, 114 to 118 and 127). No space was provided for a "no representation" vote.

The craft or class concerned is defined by the Board as "Clerical, office, freight and passenger service employees". It was established in 1947 in Case R-1706 by the Board (Volume 1, Determinations of Craft or Class of the National Mediation Board (1947) (R 15, 16).

The craft or class is divided into three principal groups: (1) Public contact personnel such as ticket representatives, passenger agents and reservation clerks, who number about 5,100; (2) Office and clerical help, being stenographers, clerks, office machine operators, electronic computer operators and other allied occupations who number about 4,500; and (3) Ramps and stores personnel who carry out such functions as baggage handling, storeroom work, plane cleaning and janitorial work. This group numbers about 3,000 employees (R 5). The Association for the Benefit of Non-Contract Employees submitted authorization cards to the National Mediation Board signed by approximately 6,400 of the employees of this craft or class (R 44, 102). The cards authorized the Association for the Benefit of Non-Contract Employees to represent the employees before the Board. The Board made no attempt to verify the cards nor to check the cards against the list of eligible employees (R 42). Respondent petitioned the National Mediation Board to intervene in the representation dispute February 14, 1963, and on February 25, 1963, informed the Board that respondent would not seek recognition as a bargaining agent; that they would not seek a place on the ballot; and that they were acting independently of, without the sanction, assistance or recognition of United Air Lines (R 102, 106-111).

On March 27, 1963, the Board ruled that the plaintiff was not a proper party in interest in the dispute and dismissed the petition wherein respondent asked for a reconsideration of the class or craft grouping.

with or without a public hearing, and a change in the form of ballot to permit employee voters to cast a valid vote for no union representation (R 14-17, 44). On April 5, 1963, respondent requested the Board to reconsider its denial, and on April 12, 1963, the Board denied respondent's request for reconsideration (R 45, 111). On April 13, 1963, respondent filed an action in the District Court for the District of Columbia seeking to enjoin the Board from holding the election which had been scheduled for the 22nd of April, 1963, asking that the Board grant a hearing on the class or craft question and to provide a ballot form upon which employee voters could indicate their preference for no bargaining representation (R 4).

On April 18, 1963, on respondent's motion, the District Court (Hart, J.) entered a Temporary Restraining Order staying the election scheduled. The motion was opposed by the National Mediation Board by affidavits and oral argument. After an extension of the Restraining Order, the case came before the District Court (Youngdahl, J.) on respondent's Motion for Preliminary Injunction. The motion was opposed by the Board, again, on affidavits and oral argument. Respondent's motion was granted and a Preliminary Injunction was issued on May 3, 1963.

In granting the Preliminary Injunction the court filed a Memorandum, Findings of Fact and Conclusions of Law (R 128-133). Contemporaneously with the granting of the Preliminary Injunction, the Court issued an Order to Show Cause to the Board why the Injunction should not be made permanent (R 132).

Thereafter, the Board filed its response to the Order to Show Cause together with a Motion to Dismiss the Complaint, or in the alternative, for summary judgment. The motion was supported by affidavit.

On May 29, 1963, Judge Youngdahl denied the Board's motion and entered its order for Permanent Injunction supported by an opinion (R 166, 170). The injunction ordered the Board to refrain from conducting any election among United Air Line's employees in the craft or class concerned in which the ballot form used would not permit a voting employee to cast a valid vote against representation. It also remanded to the Board respondent's request that the Board conduct a hearing on the question of the appropriateness of the class or craft, at which hearing the respondent could be heard as a party in interest, for further consideration in the light of the Court's conclusion that the Railway Labor Act, 45 USC, Section 151, et seq. gave employees the right to a ballot on which they could express a preference for no collective bargaining representation (R 170-171). The opinion of the District Court is reported in 218 F Supp 114.

Appeals from the District Court's decisions were filed by the NMB (No. 18068) and by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (No. 18072); which had intervened in the action. An appeal was also taken in Case No. 17777, which involved a complaint filed by the carrier, United Air Lines, wherein the carrier sought a hearing on the craft or class question and

standing at said hearing and likewise complained as to the form of the ballot. The three appeals were consolidated.

The Court of Appeals in a per curiam decision (Miller and Bastian, J. J. (Wright, J. dissented)), affirmed the decisions in Numbers 18068 and 18072 supporting the Permanent Injunction granted to the respondent herein (Appendix A, pages 13 to 22 of National Mediation Board Petition for Writ of Certiorari).

The court also affirmed the decision in No. 17777 dismissing the United Air Lines suit.

REASONS FOR DENYING THE WRIT

The decision below should be permitted to stand. There is no conflict among the Courts of Appeal, and the decision does not present any issue of an importance warranting Supreme Court review.

The decision of the District Court which was affirmed on appeal determined as a matter of statutory construction of the Railway Labor Act that the National Mediation Board was required to provide in its election a ballot form on which voters would indicate their preference for no representation. The Board argues that this court action is an unlawful interference by the judiciary of Board function.

While there is no question that judicial review of the National Mediation Board action in the exercise of its administrative functions under the Railway

Labor Act has been precluded in certain areas, these areas concern themselves with the Board's "expertise" or judgment concerning the technical matters which come before it. Examples of these are: the definition and scope of a "craft or class" (*Switchmen's Union v. National Mediation Board,* 320 US 297 (1943).) The determination of a bargaining representative as between two contending unions (General Committee) and the determination of eligibility of voters (*Decker v. Venezolana,* 103 US App DC 301, 258 F (2) 153 (1958), *WES Chapter v. National Mediation Board,* 114 App DC 229, 314 F (2) 234 (1962).)

The courts, however, have routinely taken jurisdiction in National Mediation Board cases wherein questions of statutory authority or constitutional guarantees were involved. Such a case involved the requirement of negotiation by an employer with a representative, after the Board has designated such representative (*Virginian Ry v. System Federation,* 300 US 515 (1937).) Whether the Act required that the representative represent all members of the craft or class regardless of race (*Tunstall v. Brotherhood of Locomotive Firemen,* 323 US 210 (1944).) Whether or not the Board's procedures in a given case fulfilled the requirements of an "investigation" as defined by the Act (*WES Chapter v. National Mediation Board,* supra, *UNA Chapter v. National Mediation Board,* 294 F (2) 905, cert. denied 368 US 956); and a review of the Board's construction of the Railway Labor Act with respect to geographical scope. (*Airline Dispatchers Association v. National Media-*

tion Board, 89 US App DC 24, 189 F (2) 685, cert. denied 342 US 841.)[2]

The judicial action taken in this case is within the purview of the cases in which the courts have routinely taken jurisdiction. The National Mediation Board action was in excess of its statutory authority and was an infringement on the constitutional rights of the employees under the Due Process Clause of the Constitution.[3]

The right to judicial action in this case further relies on the provisions of the Administrative Procedure Act which supersedes the earlier cases, and which was applied in a case involving a National Mediation Board act in the *Airline Dispatcher's* case, supra.

The National Mediation Board to justify its action takes two inconsistent positions. First, the Board contends that the Railway Labor Act delivers to it, a "mandate" to ensure, by its procedures that employees under its jurisdiction are provided with *some* representation. This interpretation of the Act, admittedly consisting solely of the Agency's own analysis (which, parenthetically, is subject to grave question

---

[2]The last case noted (*Airline Dispatchers*, supra) is of particular importance in that it reviewed the *Switchmen's* case, supra, and noted that under the provisions of the Administrative Procedure Act, 5 USCA § 1001-11, the broad statements of the earlier case must be re-examined. Concluding that if the "nature of the question" was such as to suggest judicial review then the Administrative Procedure Act would authorize such review.

[3]It should be noted that in the earlier cases such as the *Switchmen's* case, supra, the court's right to intervene on constitutional grounds was specifically excepted from the decisions.

in the light of the legislative hearings and reports on enactment of the bill. Respondent's Brief on Appeal, pages 28-30). To effect this agency determination of statutory intent, the Board refuses to provide a space for a no union representation vote on its ballot and refuses to explain its election procedures on the ballot or its accompanying material. In justification of this procedure the Board in its brief refers to a technical pamphlet published by it in 1957, and to a letter mailed to the airline carrier during the dispute. (National Mediation Board Petition for Writ of Certiorari, page 4).

Presented independently, this argument states the Board's position and provides a clear avenue of action with respect to those employees under its jurisdiction.

At this point, however, we encounter the Board's problem, which rises out of the Act, and which produces the Board's second, and totally inconsistent position. The Act provides, and the Board has admitted, throughout these proceedings, that a "majority" of the employees in the "craft or class" concerned shall determine who the representative of that "craft or class" shall be.[4]

The Board has thus created a dilemma. While admitting the right of employees to refuse to designate a representative by failing to provide a vote of the ma-

[4]In conducting an election, if a majority of the eligible voters in the "craft or class" concerned, fail to vote for a given representative, the Board will not designate a bargaining representative (R 46, 98).

jority, the Board attempts to confuse and misdirect the employee by refusing to permit him a fair and unequivocal ballot form on which he can exercise this right.

The agency admitting a right in the employees under its jurisdiction attempts to subvert that right by covert means.

Prior to entry of the injunction, the District Court, in an attempt to clarify the situation and perhaps alleviate the difficulty, queried counsel for the Board about the possibility of placing some explanatory material on the ballot so that employees might be apprised of the manner in which the Board conducted its elections and the effect of a refusal to vote. The position of the Board was stated that no such assistance would be given the voter, the Board's intention being to ensure the election of *some* representation (Respondent's Brief on Appeal, pages 21, 22).

In its petition, the Board's position, the validity of which is studiously avoided by the Solicitor General, is supported principally by a reference to administrative interpretation and long time acquiescence. These reasons are of scant value in justifying the action of an agency acting for the United States government in a manner which, fairly stated, is deliberately failing to effectively inform the large number of citizens with which the agency deals, as to the rules governing its elections. Indeed, going further, in providing a ballot form which will encourage a misunderstanding by the citizen of his rights in Board elections.

In view of the Board's admission and acceptance of the Act's directive with respect to an employee-voter's right to refuse union representation, the Board's action in failing to provide for the effective exercise of that right, must be said to be outside the Act, and in excess of the Board's delegated authority.

The practice and effect of the Board's action must also be said to be in violation of the employee's right to due process under the Fifth Amendment as it deprives those employees of a substantial right granted to them by Congress without hearing or compensation. The procedure likewise must be considered violative of all constitutional concepts of fair play, in that it deprives those employees of their right, without notice, by what purports to be, official government action.

Leedom v. Kyne, 358 US 184, illustrates an instance of judicial review in a case where the National Labor Relations Board, an agency similar to the National Mediation Board, acted outside of its statutory authority and in excess of its delegated powers. The court took jurisdiction and struck down the unlawful act.

It is argued that *Leedom v. Kyne* does not apply here in that no specific statutory provision is made for a ballot form in the Act. Respondent contends and the decision here determined that the Act does provide, while not the actual format, the general content of a valid ballot from its various provisions and that therefore the court was entitled to intervene.

The Solicitor General is quite candid in his reference to the remand on the hearing question on review of the "Craft or class" delineation (National Mediation Board Petition for Writ of Certiorari, page 11). The decision does not require a Board hearing, nor does it enjoin the election pending a hearing by the Board. In fact, the court pointed out that it was providing the Board with an opportunity to reconsider granting a hearing in the light of the court's opinion on the requirement of the Act with respect to ballot form.

The remand did nothing more than provide the Board with a chance to again make the decision as to whether it would order a hearing on the "craft or class" after it was aware of the requirement of the Act. No action by the Board with respect to the hearing was directed or demanded.

It cannot be said that the decision providing the agency with an opportunity to reevaluate its position after being instructed as to the requirement of the Act was either a "review" of Board action, or interference by the judiciary with the exercise of the Board's discretion under the Act.

CONCLUSION

The most thoughtful and careful attention has been given this case by the various judges who have ruled on the matter. In each instance from the original granting of the Temporary Restraining Order through

the decision of the Court of Appeals, the legality and essential justice of the respondent's position has been recognized.

The National Mediation Board has been unable to demonstrate wherein its statutory authority grants to it the arbitrary power it has appropriated, or why it should deny the employees under its jurisdiction the opportunity that has for many years been afforded the employees under the National Labor Relations Board.[5]

The National Mediation Board's action was invalid under the Railway Labor Act and violative of constitutional guarantees and concepts of fair play. Judicial intervention is proper in either instance. Additionally, the provisions of the Administrative Procedure Act vest the Federal Court with jurisdiction.

The petitions for a writ of certiorari should be denied.

Dated, August 25, 1964.

Respectfully submitted,
ALEX L. ARGUELLO,
ARGUELLO, GIOMETTI, MCCARTHY,
JEROME C. MUYS,
ELY, DUNCAN & BENNETT,
By ALEX L. ARGUELLO,
Attorneys for Respondent.

---

[5]The National Labor Relations Board provided a space for a "no representation" vote long before the National Labor Relations Act itself was amended to afford that right (Respondent's Brief on Appeal pages 24-28).